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Prosecuting Vote Suppression by Misinformation

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Following the 2016 U.S. presidential election, concerns about the influence of "fake news" proliferated in the media. Questions abounded regarding the affect social media platforms may have had on the electorate. Election Day 2016 had many in the media pondering: "Did Social Media Ruin Election 2016?"[1] and "Facebook's failure: did fake news and polarized politics get Trump elected?"[2] Two years after the election, social science scholars were still studying the effect of voters' consumption of fake news stories leading up to November 8.[3] The current fascination in the U.S. regarding fake news and, relatedly, the role of social media as a news-sharing entity, raises a worthwhile question: how do we prevent fake news without infringing on the right to free speech? This paper does not purport to answer this lofty inquiry but, instead, will address a slightly narrower one. Specifically, how should we curb those communications that work to corrupt the voting franchise by means of misleading or deceiving voters? In Part I, this paper will discuss some of the common types of misinformation used to deceive voters. Part II will briefly look at the history of protecting the right to vote in U.S. elections. Part III will examine the efficacy of the current legal framework for prosecuting election suppression efforts. Finally, Part IV will address a potential legislative reform to eliminate the inadequacies of this current framework.

I. VOTER SUPPRESSION BY MISINFORMATION

On October 24, 2018, U.S. Immigration and Customs Enforcement sent out a tweet on the social media platform, Twitter, stating: "ICE does not patrol or conduct enforcement operations at polling locations. Any fliers or advertisements claiming otherwise are false."[4] This announcement came after the agency became aware of rumors being spread on social media, and through physical fliers, that ICE would be interfering at polling locations.[5] The fliers, found on a sidewalk in Milwaukee, displayed the Department of Homeland Security seal and warned that if voters lacked proper documentation, they might "risk immediate detainment."[6] They also included a phone number "to report illegal aliens" that redirected to DHS's investigations tip line.[7] This suppression technique was not new. Two years prior, in the midst of the 2016 election, photos had circulated online purporting to show ICE officers arresting voters at the polls.[8] These photos, like the 2018 rumors, were fabrications.

Misinformation efforts have long been a tactic of suppressing the vote, particularly the vote of underprivileged groups, since at least the Jim Crow Era. An anecdote reiterated last year by writer and professor Jelani Cobb paints the picture well:

Decades ago, amid the most overt privations of Jim Crow, African-Americans used to tell a joke about a black Harvard professor who moves to the Deep South and tries to register to vote. A white clerk tells him that he will first have to read aloud a paragraph from the Constitution. When he easily does so, the clerk says that he will also have to read and translate a section written in Spanish. Again he complies. The clerk then demands that he read

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[1] Sam Sanders, *Did Social Media Ruin Election 2016?*, NPR POLITICS (Nov. 8, 2016), https://www.npr.org/2016/11/08/500686320/did-social-media-ruin-election-2016.

[2] Olivia Solon, *Facebook's failure: did fake news and polarized politics get Trump elected?*, THE GUARDIAN (Nov. 10, 2016), https://www.theguardian.com/technology/2016/nov/10/facebook-fake-news-election-conspiracy-theories.

[3] Aaron Blake, *A new study suggests fake news might have won Donald Trump the 2016 election*, THE WASHINGTON POST (Apr. 3, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/03/a-new-study-suggests-fake-news-might-have-won-donald-trump-the-2016-election/?utm_term=.4b5bef655569.

[4] ICE (@ICEgov), TWITTER (Oct. 24, 2018, 5:30 AM), https://twitter.com/ICEgov/status/1055074126451392513?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1055074126451392513&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2018%2F11%2F05%2Fus%2Fpolitics%2Fmisinformation-election-day.html.

[5] Blake Paterson, *ICE, Dispelling Rumors, Says it Won't Patrol Polling Places*, PRO PUBLICA (Nov. 2, 2018), https://www.propublica.org/article/ice-dispelling-rumors-says-it-wont-patrol-polling-places.

[6] *Id.*

[7] *Id.*

[8] *Id.*

sections in French, German, and Russian, all of which he happens to speak fluently. Finally, the clerk shows him a passage in Arabic. The professor looks at it and says, 'My Arabic is rusty, but I believe this translates to "Negroes cannot vote in this country."'"[9]

Sadly, voter deception schemes, as well as the often overtly racial motivations behind them, are alive and well today. "Old jokes have lately been finding renewed salience," Cobb noted.[10]
In 2005, then-Senator Barack Obama highlighted some of the efforts used to suppress minority voters today. He explained:

> Think about the story of the 2004 presidential election when voters in Milwaukee received fliers from the non-existent "Milwaukee Black Voters League," warning that voters risk imprisonment for voting if they were ever found guilty of any offense – even a traffic violation. In that same election, in a county in Ohio, some voters received mailings misinforming voters that anyone registered to vote by the Kerry Campaign or the NAACP would be barred from voting….Voters are often warned that an unpaid parking ticket will lead to their arrest or that folks with family members who have been convicted of a crime are ineligible to vote. Of course, these warnings have no basis in fact, and they are made with one goal and one goal only – to keep Americans away from the polls.[11]

These methods of vote suppression are, unfortunately, quite common. In 2002, voters in public housing complexes in New Orleans received fliers stating that voters could cast their ballots after election day if the weather was bad.[12] In 2004, newly registered voters in Ohio were sent letters (claiming to be from the county Board of Elections) informing them that their registrations were illegal and that they would not be permitted to vote.[13] That same year, elderly Ohioans reported receiving calls asserting to be from the county Board of Elections, erroneously indicating that the voters' polling place had changed, or offering to hand-deliver absentee ballots.[14] Voters who followed up with the Board of Elections were told the calls had not derived from the election board and that others had reported similar calls.[15]

In 2004 and 2006, voters in Wisconsin and Pennsylvania reported receiving robocalls telling them to vote the day after Election Day, or providing incorrect polling location information.[16] In 2006, 14,000 Latino voters in California received letters in Spanish stating that it was a crime for immigrants to vote in a federal election, without mentioning that immigrants who are citizens have the right to vote.[17] In 2008, the email of the George Mason University Provost was hacked and used to send an email to the entire school stating that the election had been moved to the day after Election Day.[18] In 2008, voters in Pennsylvania reported receiving calls telling them that Latinos were only allowed to vote from 2:00-6:00 PM on Election Day.[19] Others that year reported receiving fliers, falsely declaring to be from the Obama campaign, that provided incorrect polling location information.[20] That same

[9] Jelani Cobb, *Voter-Suppression Tactics in the Age of Trump*, THE NEW YORKER (Oct. 21, 2018), https://www.newyorker.com/magazine/2018/10/29/voter-suppression-tactics-in-the-age-of-trump.
[10] *Id.*
[11] 151 Cong. Rec. 25447 (2005) (statement of Sen. Barack Obama).
[12] 153 Cong. Rec. 17161 (2007) (statement of Rep. Sheila Jackson-Lee).
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] COMMON CAUSE, LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW, DECEPTIVE ELECTION PRACTICES AND VOTER INTIMIDATION, 14, 19 (2012), https://lawyerscommittee.org/wp-content/uploads/2015/07/DeceptivePracticesReportJuly2012FINALpdf.pdf [hereinafter DECEPTIVE ELECTION PRACTICES].
[17] Editorial, *Honesty in Elections*, THE NEW YORK TIMES (Jan. 31, 2007), https://www.nytimes.com/2007/01/31/opinion/31wed1.html.
[18] DECEPTIVE ELECTION PRACTICES, *supra* note 16, at 17.
[19] *Id.* at 14.
[20] *Id.*

year, students at the University of Florida received text messages instructing voters supporting Obama to vote the day after Election Day due to long lines at the polls.[21] As one Congressman presciently stated: "[t]he targets of these tactics seem to always be the same: racial minorities, immigrants and poor communities."[22]

While the identities of these culprits are often unknown, efforts to deceive voters, and the actors engaged in them, are at times evident. During the 2006 midterm elections, Republican gubernatorial candidate Robert Ehrlich made headlines for paying 300 poor African-Americans $100 each to distribute fliers in predominantly black neighborhoods in Baltimore.[23] These fliers purported to list the Democratically endorsed candidates on the ballot (a "Democratic Sample Ballot").[24] Instead, the fliers listed Ehrlich (a Republican) as well as the Republican Senate candidate, Michael Steele, followed by a long list of local Democratic candidates.[25]

Today, a fraudulent message of this sort can reach millions of voters with just the click of a button. For instance, one message circulating on online platforms ahead of the 2016 election told voters: "Save time. Avoid the line. Vote from home."[26] These communications specifically targeted an audience of likely Democratic Party supporters by depicting racial minorities, by mimicking Clinton campaign graphics and by tagging the posts with Clinton campaign hashtags like "#ImWithHer."[27] One meme featured a photoshopped image of Indian-American comedian Aziz Ansari holding a sign stating: "Tweet ClintonKaine with the hashtag #PresidentialElection on November 8th, 2016 between 8AM and 6PM to cast your vote."[28] Another image, depicting a black woman holding an "African Americans for Hillary" sign, asked voters to "Text 'Hillary' to 59925" to "Vote for Hillary and be a party of history."[29] At a Senate Judiciary hearing in October 2017 on the topic of Russia's use of social media to spread misinformation during the U.S. election, Sen. Amy Klobuchar said of these tweets: "Efforts like this are actually criminal."[30]

Voter deception of the sort described above illustrates the outlet voter suppression efforts have found in social media. While tactics like fake fliers have been used for years to mislead or intimidate voters, suppression efforts, like most other communications, can spread much further and more quickly through online platforms. For evidence of the reach these communications can have, look no further than the fact, as noted earlier, that a government agency found it necessary to put forth an official response in order to quell rumors flourishing online. This online audience can be reached, nonetheless, while preserving the sender's relative anonymity.

For example, one image spread on Twitter and some right-wing blogs in 2016 claimed to depict poll workers in Nevada wearing "Defeat Trump" shirts, although election officials are prohibited from wearing partisan apparel at voting locations.[31] The image, in fact, was taken at a union event that occurred days prior. The identity of the image's creator is hard to determine, as is the creator's intent. This image could represent an effort to mobilize Trump supporters – whether by stoking feelings of anger towards their opponents, or by encouraging Trump-

[21] *Id.* at 11.
[22] 153 Cong. Rec. 17160 (2007) (statement of Rep. Sander Levin).
[23] Matthew Mosk & Avis Thomas-Lester, *GOP Fliers Apparently Were Part of Strategy*, WASHINGTON POST (Nov. 13, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/11/12/AR2006111201084.html?referrer=emailarticle.
[24] *Id.*
[25] *Id.*
[26] Kurt Wagner, *These are some of the tweets and Facebook ads Russia used to try and influence the 2016 presidential election*, RECODE (Oct. 31, 2017), https://www.recode.net/2017/10/31/16587174/fake-ads-news-propaganda-congress-facebook-twitter-google-tech-hearing.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Craig Silverman, *No, Poll Workers in Nevada Did Not Wear "Defeat Trump" Shirts on Election Day*, BUZZFEED NEWS (Nov. 8, 2016), https://www.buzzfeednews.com/article/craigsilverman/no-poll-workers-in-nevada-did-not-wear-defeat-trump-shirts.

inclined voters to turn out to the polls by overstating the extent to which anti-Trump voters were mobilized. Potentially, it could have been intended to deter Trump supporters by indicating that they may face intimidation at the polls. Or, this image could have been intended to suppress the vote generally, by fostering doubt in the democratic system as a whole, and in the neutrality of poll workers, specifically. Aside from challenges in identifying the intent of the creator, the purveyor's identity is similarly concealed – a function of the internet's inescapable anonymity. These challenges represent only some of the reasons why prosecution of deceptive online communications is difficult under current law.

II. HISTORY OF PROTECTING THE RIGHT TO VOTE

The Supreme Court affirmed the constitutionally protected nature of the right to vote in the landmark case, *Reynolds v. Sims*.[32] The *Reynolds* court held that "the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."[33] "The right to vote can neither be denied outright," the Court explained, "nor diluted by ballotbox stuffing."[34] After outlining a number of ways the right to vote had been expanded in the U.S. over time, the *Reynolds* court told us that "history has seen a continuing expansion of the scope of the right to suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[35] Decades earlier in *Yick Wo v. Hopkins*, the Supreme Court held the right to vote to be "a fundamental political right, because preservative of all rights."[36] "[O]ther rights, even the most basic are illusory if the right to vote is undermined," the Court reasserted in 1964.[37]

Long before the Court affirmed the right to vote as constitutionally protected, Congress had passed a series of laws which extended civil rights protections, including suffrage protections, to recently emancipated slaves following the civil war. These laws, deemed the "Enforcement Acts," are to some extent still in place today, and those statutes continue to be the primary method by which the federal government enforces the civil rights of individual citizens. 18 U.S.C. §§241 and 242 provide broad jurisdiction to prosecute corruption of rights. The statutes cover the intentional deprivation of any right protected under the Constitution or federal law. §241 makes it unlawful for two or more persons "to conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."[38] §242 makes it unlawful for anyone "acting under color of law" to deprive a person of such a right.[39] While efforts by state actors to deprive voters of their rights does occur, this paper addresses the narrower question of efforts by non-state actors. Thus, the ensuing analysis will focus on uses of §241 to prosecute crimes corrupting the election process.

III. 18 U.S.C. §241: CONSPIRACY AGAINST RIGHTS

As noted above, 18 U.S.C. §241 is the current legal framework under which crimes against civil rights, including the voting franchise, may be prosecuted at the federal level. Despite the statute's extensive reach, its application to newer forms of corruption is at times uncertain – presenting problems for example, for prosecutors who wish to hold accountable purveyors of deceptive communications that disenfranchise voters. Since its original use as a

[32] Reynolds v. Sims, 377 U.S. 533 (1964).
[33] *Id.* at 554.
[34] *Id.* at 555.
[35] *Id.*
[36] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
[37] Wesberry v. Sanders, 376 U.S. 1, 17 (1964).
[38] 18 U.S.C. §241 (2018).
[39] 18 U.S.C. §242 (2018).

method for addressing efforts to deprive newly freed slaves of the basic rights of citizenship, the federal government has expanded the purview of the statute to cover any deprivation of a right derived from the Constitution or from federal law. The breadth of the statute is evident from the variety of crimes it has been used to prosecute. With respect to the corruption of elections alone, §241 has been successfully used to prosecute conspiracies that involved stuffing a ballot box with forged ballots;[40] preventing the official count of ballots in a primary election;[41] destroying voter registration applications;[42] destroying ballots;[43] exploiting the infirmities of elderly or handicapped people by casting absentee ballots in their names;[44] illegally registering voters and casting absentee ballots in their names;[45] injuring, threatening, or intimidating a voter in the exercise of his right to vote;[46] impersonating qualified voters;[47] failing to count votes and altering votes counted;[48] stealing votes by changing the votes cast by voters at voting machines;[49] and coercing tenants to vote by threatening eviction for those who fail to comply,[50] to name a few.

The Supreme Court acknowledged the broad scope of §241 when it opined that "[t]he language of §241 is plain and unlimited. [It] embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States….We think [its] history leaves no doubt that, if we are to give §241 the scope its origins dictate, we must accord it a sweep as broad as its language."[51] The broad scope of the law allows for the sweeping protection of federally recognized rights. At the same time, it constructs some barriers for applying the law when new types of violations must be articulated. To that end, the statute has been the target of a vast number of vagueness challenges in federal courts – although to little avail.[52] As the Supreme Court noted in *U.S. v. Guest*:

> [I]nclusion of Fourteenth Amendment rights within the compass of 18 U.S.C. s 241 does not render the statute unconstitutionally vague….the rights under the Equal Protection Clause described…have been so firmly and precisely established by a consistent line of decisions in this court, that the lack of specification of these rights in the language of s 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness."[53]

[40] *See* Baker v. Carr, 369 U.S. 186 (1962); United States v. Saylor, 322 U.S. 385 (1944); United States v. Mosley, 238 U.S. 383 (1915); Ex Parte Siebold, 100 U.S. 371 (1879); United States v. Olinger, 759 F.2d 1293 (7th Cir. 1985).
[41] *See* United States v. Classic, 313 U.S. 299 (1941).
[42] *See* United States v. Haynes, Nos. 91-5979, 91-6076, 1992 WL 296782, at *1 (6th Cir. Oct. 15, 1992).
[43] *See* In re Coy, 127 U.S. 731 (1888); United States v. Townsley, 843 F.2d 1070, 1073-75 (8th Cir. 1988).
[44] *See* United States v. Morado, 454 F.2d 167, 171 (5th Cir. 1972).
[45] *See* United States v. Weston, 417 F.2d 181, 182-85 (4th Cir. 1969).
[46] *See* Fields v. United States, 228 F.2d 544 (4th Cir. 1955).
[47] *See* Crolich v. United States, 196 F.2d 879, 879 (5th Cir. 1952).
[48] *See* Ryan v. United States, 99 F.2d 864, 866 (8th Cir. 1938); Walker v. United States, 93 F.2d 383, 386 (8th Cir. 1937).
[49] *See* United States v. Thompson, No. 6:09-16-KKC, 2013 WL 5528827, at *1 (E.D. Ky. Oct. 4, 2013).
[50] *See* United States v. Robinson, 813 F.3d 251 (6th Cir. 2016).
[51] United States v. Price, 383 U.S. 787, 800-01 (1966).
[52] *See, e.g.,* Price, 383 U.S. at 806 n. 20 ("This court has rejected the argument that the constitutionality of s 241 may be affected by undue vagueness of coverage. The court held with reference to s 242 that any deficiency is cured by the requirement that specific intent be proved. There is no basis for distinction between the two statutes in this respect."); United States v. Stewart, 65 F.3d 404, 410 (11th Cir. 1995) ("we agree with the Eighth and Ninth Circuits which have already rejected vagueness and overbreadth challenges to [§241]"); United States v. McDermott, 29 F.3d 404, 410 (8th Cir. 1994) (holding §241 not vague or overbroad); United States v. J.H.H., 22 F.3d 821, 828 (8th Cir. 1994 ("We find that the language of [§241] is sufficiently precise to put a person of common intelligence on notice that conduct of the sort engaged in by appellants is punishable under these statutes."); United States v. Lee, 935 F.2d 952, 956 (8th Cir. 1991) ("[Defendant] contends the statute is vague because it fails to give notice that burning a cross is a crime. This contention is without merit. The statute does not prohibit the burning of a cross; the statute prohibits conspiracies where the requisite specific intent is demonstrated.").
[53] United States v. Guest, 383 U.S. 745, 753-54 (1966).

This passage leaves a prosecutor to determine, therefore, whether a right has been "firmly and precisely established" – in the present case, whether the spread of misinformation would be considered a "firmly established" violation of the right to vote.

Originally, §241 applied only to schemes corrupting elections for federal office, meaning any election in which a federal candidate was on the ballot. More recently, the statute has been applied to non-federal elections where state action was a necessary feature of the fraud.[54] This state action requirement has been realized where poll officials or notaries public participated in the scheme, or where the scheme involved persons making themselves out to be state officials. Still, federal prosecutors currently have no recourse for prosecuting violations of voters' rights in local or state elections, unless the scheme to deprive involved some sort of state action.

Federal courts have concluded that a §241 conspiracy need not be successful to result in a violation.[55] In the election context, the Fifth Circuit held that to prevail in its case, the government need not show "that the election occurred, that vote dilution was accomplished, or that a single illegitimate ballot was cast."[56] In fact, given that the statute criminalizes the act of conspiracy, §241 "does not require an overt act at all be shown."[57] The Seventh Circuit concluded that the statute applies to conduct affecting the integrity of the federal election process as a whole, and does not require the prosecution establish any fraudulent action against a particular voter has occurred in order to succeed.[58] These concessions do not necessarily make the job of establishing a §241violation easier for federal prosecutors. The statute is necessarily limiting to the extent that a crime of conspiracy inherently involves more than one person, as explicitly asserted in the statutory language. Moreover, a prosecutor may be able to prove that an overt action was taken that deprived a voter of his rights, without being able to prove that a conspiracy to defraud was involved in that action.

To establish such a conspiracy, it is sufficient for the government to show the existence of even "a tacit understanding….[of] a conspiratorial agreement."[59] Once a conspiracy has been established, "the defendant must only have a slight connection to link him with the conspiracy."[60] This slight connection may be proven, the Ninth Circuit elaborated, "by proof of the defendant's willful participation in the illegal objective with the intent to further some purpose of the conspiracy."[61] The Ninth Circuit held in a later case that "ample evidence" existed of a conspiracy with the specific intent to deprive others of a constitutional right even where "there was no direct proof of an express agreement on the part of appellants to commit the constitutional violations here at issue."[62]

To obtain a conviction under §241, "the government must prove that [the defendant] knowingly agreed with another person to injure [a third party] in the exercise of a right guaranteed under the Constitution," and "that there was a specific intent to commit the deprivation."[63] The Third Circuit instructed that as to the intent requirement, "willfulness encompasses 'reckless disregard of a constitutional requirement.'"[64] And the Ninth Circuit added: "an

[54] *See* United States v. Olinger, 759 F.2d 1293 (7th Cir. 1985) (citing United States v. Anderson, 481 F.2d 685, 698-701 (4th Cir. 1973)) ("the federal government has power not only to punish conspiracies to poison federal elections, but has the power also to punish conspiracies, involving state action at least, to dilute the effect of ballots cast for the candidate of one's choice in wholly state elections").
[55] *See* United States v. Bradberry, 517 F.2d 498, 499 n. 6 (7th Cir. 1975).
[56] United States v. Morado, 454 F.2d 167, 169 (5th Cir. 1972).
[57] *Id.* (citing Wilkins v. United States, 376 F.2d 552, 562 (5th Cir. 1967); Smith v. United States, 157 F. 721 (9th Cir. 1907)).
[58] United States v. Nathan, 238 F.2d 401, 407 (7th Cir. 1956).
[59] United States v. Gresser, 935 F.2d 96, 101 (6th Cir. 1991).
[60] United States v. Skillman, 922 F.2d 1370, 1373 (9th Cir. 1990) (citing United States v. Hernandez, 876 F.2d 774, 779 (9th Cir. 1989)).
[61] Skillman, 922 F.2d at 1373 (citing United States v. Weaver, 594 F.2d 1272, 1274 (9th Cir. 1979)).
[62] United States v. Reese, 2 F.3d 870, 893 (9th Cir. 1993).
[63] United States v. Lanham, 617 F.3d 873, 885 (6th Cir. 2010) (quoting United States v. Epley, 52 F.3d 571, 575-76 (6th Cir. 1995)) (internal quotations omitted).
[64] United States v. Dise, 763 F.2d 586, 592 (3d Cir. 1985).

act is done willfully if it is done voluntarily and intentionally and with a specific intent to do something the law forbids, that is, with the intent to violate a specific protected right."[65] Finally, the D.C. Circuit summarized the intent requirement to mean that if a defendant acted "with the particular purpose of depriving the citizen victim of his enjoyment of the interests" protected by a constitutional right, "he will be adjudged as a matter of law to have acted 'willfully' i.e., 'in reckless disregard of constitutional prohibitions or guarantees.'"[66]

The federal circuit courts have reached a consensus that the defendant in a §241 case need not have a "legalistic appreciation of the federally protected nature of [the violated] right" in order to find specific intent to deprive.[67] As the D.C. Circuit clarified: "the specific intent needed for a conviction under section 241 does not require recognition by the defendant of the unlawfulness of his acts, but only an intent to commit actions which in fact deprive a citizen of constitutional rights which are firmly established and plainly applicable."[68] Therefore, in a prosecution for depriving a voter of his rights, a conviction would only require that the jury find the defendant had the intent to cause a citizen not to vote, or (possibly) to cause a change in a voter's voting choice contrary to the voter's wishes - not that the defendant knew the aforementioned result would amount to a violation of a Constitutional right.[69]
Moreover, in the context of election fraud, the Supreme Court in *Anderson* held that the specific intent required for a conviction under §241 need not be the specific intent to influence the federal election, as long as there exists "the intent to have false votes cast and thereby to injure the rights of all voters in a federal election."[70] Thus, if a defendant claims to have had only the specific intent to influence a state or local election, as long as the scheme involves a mixed federal-state election, the *Anderson* court tells us, there exists a specific intent "to have false votes cast" in a federal election in violation of §241.[71]

The intent requirement of this statute may pose a significant impediment to prosecutions of the sort at issue here – where the prevalence of satire on the internet could provide cover for defendants hoping to evade the specific intent element, and where questions remain as to the scope of the right (see footnote 71 above). For reasons to be addressed below, this intent requirement is likely a necessary requirement given the First Amendment challenges that arise when criminalizing communications and the potential for over-deterrence of well-intended actors. As to the scope of the voting right - in 2005, the District of New Hampshire held that §241 could be applied to a scheme to jam the phone lines of a get-out-the-vote service in an effort to prevent voters from obtaining rides to the polls.[72] This case indicates how far courts will extend protections of the right to vote. However, it is hard to know

[65] United States v. Reese, 2 F.3d 870, 885 (9th Cir. 1993).
[66] United States v. Ehrlichman, 546 F.2d 910, 921 (D.C. Cir. 1976).
[67] United States v. Redwine, 715 F.2d 315, 319-20 (7th Cir. 1983) (citing United States v. Guest, 383 U.S. 745 (1966)). *See also* United States v. Cobb, 905 F.2d 784, 788 (4th Cir. 1990); United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir. 1986); United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985); United States v. Dean, 722 F.2d 92, 94 (5th Cir. 1983); United States v. Harrison, 671 F.2d 1159, 1162 (8th Cir. 1982); United States v. McClean, 528 F.2d 1250, 1255 (2d Cir. 1976); United States v. Stokes, 506 F.2d 771, 776 (5th Cir. 1975); United States v. O'Dell, 462 F.2d 224, 232 n. 10 (6th Cir. 1972); United States v. Ramey, 336 F.2d 512, 515 (4th Cir. 1964); Apodaca v. United States, 188 F.2d 932, 937 (10th Cir. 1951); and Pullen v. United States, 164 F.2d 756, 758-59 (5th Cir. 1947).
[68] Ehrlichman, 546 F.2d at 913.
[69] Whether a change in a voter's choice in candidate would be judged a violation of that voter's constitutional rights is still in question. While federal courts have recognized violations for "coercing" voters into voting for one candidate over another (*see* Robinson, 813 F.3d 251), it is a separate question whether the sharing of misinformation about a candidate would qualify as "coercion," or separately, whether the right to vote could be read to include, in its own right, interference with voting behavior due to an intentional deception regarding candidate information.
[70] Anderson v. United States, 417 U.S. 211, 226 (1974).
[71] *Id.*
[72] United States v. Tobin, No. 04-216-01 (SM), 2005 WL 3199672, at *1-3 (D.N.H. Nov. 30, 2005) ("knowingly joining a conspiracy with the specific intent to impede or prevent qualified persons from exercising the right to vote is conduct punishable under §241….That the tactics chosen to support the strategy – cutting off an available means of transportation to polling places, for the purpose of keeping qualified persons from voting – might be described as an indirect rather than a direct assault on the free exercise of Constitutionally protected rights, is of little consequence").

with certainty whether other federal courts would agree with this conception of the right, and beyond that, whether courts would extend the right to also cover deprivations achieved by misinformation.

IV. POTENTIAL LEGISLATIVE REFORM

In 2005, then-Senator Barack Obama introduced the "Deceptive Practices and Voter Intimidation Prevention Act." In his Senate remarks introducing the bill, Obama described its intended affect as follows: The bill I am introducing today provides the clear statutory language and authority needed to get allegations of deceptive practices investigated. It establishes harsh penalties for those found to have perpetrated them. And the bill seeks to address the real harm of these crimes – voters who are discouraged from voting by misinformation – by establishing a process for reaching out to these misinformed and intimidated voters with accurate and full information so they can cast their votes in time. Perhaps just as important, this bill creates strong penalties for deceptive election acts, so people who commit these crimes suffer more than just a slap on the hand.[73]

Obama's legislative proposal represents an attempt at addressing some of the inadequacies, articulated above, for addressing illegal voter deception under current law. During House debate over the 2007 version of the Deceptive Practices and Voter Intimidation Prevention Act, Rep. Randy Forbes [R-VA] recognized the prosecutorial benefits of this proposal:

> we want to send out a message to prosecutors across the country who might get an opportunity to enforce this of how excited we are to put at least another tool in their hand where they can have the possible imprisonment of up to 5 years for denying people the right to vote…[74]

Then-Sen. Obama echoed this message when he explained that the proposal "makes voter intimidation and deception punishable by law, and it contains strong penalties so that people who commit these crimes suffer more than just a slap on the wrist."[75]

The text of Sen. Obama's 2005 proposal read as follows:

> No person, whether acting under color of law or otherwise, shall knowingly deceive any other person regarding – (A) the time, place, or manner of conducting a general, primary, run-off, or special election for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Commissioner from a territory or possession; (B) the qualifications for or restrictions on voter eligibility for any election described in subparagraph (A).[76]

Failure to comply with the above mandate would incur a fine "not more than $100,000," "imprison[ment] for not more than 1 year, or both."[77] The act would have also created a private right of action under which "[a]ny person aggrieved by a violation of subsection (b)(2) may institute a civil action or other proper proceeding for preventive relief, including an application in a United States district court for a permanent or temporary injunction, restraining order, or other order."[78] The bill also proposed a reporting mechanism

[73] 151 Cong. Rec. 25447 (2005) (statement of Sen. Barack Obama).
[74] 153 Cong. Rec. 17160 (2007) (statement of Rep. Randy Forbes).
[75] 153 Cong. Rec. 2878 (2007) (statement of Sen. Barack Obama).
[76] Deceptive Practices and Voter Intimidation Prevention Act, S. 1975, 109th Cong. (2005).
[77] *Id.*
[78] *Id.*

through which voters could report acts of deception to the Department of Justice.[79] In response to such a report, the Assistant Attorney General would be required to investigate, and if he "determines that an act of deception…occurred" would be required to "(A) undertake all effective measures necessary to provide correct information to voters affected by the deception, and (B) refer the matter to the appropriate Federal and State authorities for criminal prosecution."[80]

While the 2005 version of this bill did not see meaningful action in either the House or the Senate, versions were introduced again both in 2006 and 2007.[81] During this latter, formative year in U.S. politics, an updated version of the "Deceptive Practices and Voter Intimidation Prevention Act" passed the Democratically-held House.[82] Had Obama not then entered the race for President, some say, his legislative proposal may have passed both chambers.[83] After 2007, Congress saw proposals dedicated (at least in part) to curbing deceptive election practices in 2009, 2011, 2012, 2018 and 2019.[84]

In March 2019, the For the People Act of 2019, one such act incorporating a deceptive election practices provision, passed the House of Representatives on a strict party line vote.[85] The current version of the statutory language reads as follows:

> No person, whether acting under color of law or otherwise, shall, within 60 days before an election…by any means, including by means of written, electronic, or telephonic communications, communicate or cause to be communicated information described in subparagraph (B), or produce information described in subparagraph (B) with the intent that such information be communication, if such person – (i) knows such information to be materially false; and (ii) has the intent to impede or prevent another person from exercising the right to vote in an election…[86]

Subparagraph (B) tells us that the information referenced "is regarding – (i) the time, place, or manner of holding any election…; or (ii) the qualifications for or restrictions on voter eligibility for any such election, including – (I) any criminal penalties associated with voting in any such election; or (II) information regarding a voter's registration status or eligibility."[87] This version of the deceptive practices proposal also includes a provision criminalizing false statements regarding public endorsements when the communicator "knows such statement to be false…and has the intent to impede or prevent another person from exercising the right to vote in an election" and when "the statement states that a specifically named person, political party, or organization has endorsed the election of a specific candidate for a Federal office…and such person, political party, or organization has not endorsed the election of such candidate."[88] The act also

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[79] *Id.*
[80] *Id.*
[81] Deceptive Practices and Voter Intimidation Prevention Act, S. 4069, 109th Cong. (2006); Deceptive Practices and Voter Intimidation Prevention Act, H.R. 1281, 110th Cong. (2007); Deceptive Practices and Voter Intimidation Prevention Act, S. 453, 110th Cong. (2007).
[82] Deceptive Practices and Voter Intimidation Prevention Act, H.R. 1281, 110th Cong. (2007).
[83] DECEPTIVE ELECTION PRACTICES AT 22 ("With this momentum coming out of the House of Representatives, S. 453 was poised to be passed on the Senate floor until its lead co-sponsor announced his run for the Presidency which stalled further deliberations in the Senate.").
[84] Deceptive Practices and Voter Intimidation Prevention Act, H.R. 97, 111th Cong. (2009); Deceptive Practices and Voter Intimidation Prevention Act, S. 1994, 112th Cong. (2011); Deceptive Practices and Voter Intimidation Prevention Act, H.R. 5815, 112th Cong. (2012); Deceptive Practices and Voter Intimidation Prevention Act, S. 3279, 115th Cong. (2018); Deceptive Practices and Voter Intimidation Prevention Act, H.R. 6607, 115th Cong. (2018); For the People Act, S. 949, 116th Cong. (2019); For the People Act, H.R. 1, 116th Cong. (2019); Voter Empowerment Act, S. 549, 116th Cong. (2019); Voter Empowerment Act, H.R. 1275, 116th Cong. (2019).
[85] For the People Act, H.R. 1, 116th Cong. (2019).
[86] *Id.*
[87] *Id.*
[88] *Id.*

retains the private right of action, the reporting mechanism, and increases the criminal penalty to a fine of up to $100,000, or imprisonment of up to five years, instead of one.[89]

This legislative proposal would act as a tremendous improvement from §241's current framework by establishing, with clarity, the crime of voter suppression through deceptive communications. For a number of reasons, implementation of this act would increase the availability of criminal prosecution for harms done through election misinformation. To start, the act prohibits crimes completed by lone actors – negating the requirement under §241 that the crime involve an agreement between at least two persons. It also eliminates any necessity that the criminal act be done "under color of law," as is required, currently, in the context of violations as to purely state or local elections. The act specifically delineates the types of communications that qualify ("by any means, including by means of written, electronic, or telephonic communications"), thus eliminating any confusion related to what constitutes a prohibited communication. Arguably most significant – this proposal criminalizes the act of communication itself – not the conspiracy to deprive. In so doing, prosecutors would need not grapple with whether courts will accept the theory of misinformation as a deprivation of voter's constitutional rights – this bill makes such a deprivation federally protected in its own right. In addition, the proposal prohibits false statements about a candidate's endorsements, and thus eliminates any question of whether deceptions as to a voter's choice of candidate may be prosecuted. Inclusion of a private right of action, a reporting mechanism, and a penalty consistent with felony crimes, sends a clear message regarding the seriousness of the prohibited actions.

Notably, the proposal retains the intent requirement included in §241. For the reasons expressed below, despite the impediment this presents to prosecutors, the requirement is necessary for the constitutionality of the proposal. It is also likely desirable from a public policy perspective. As with any potential criminalization of speech, First Amendment concerns abound. However, retaining the intent requirement serves to neutralize any free speech challenge that may arise. The Supreme Court has held time and again that intentional falsehoods are not protected speech.[90] Particularly resonant for the current discussion of falsehoods in the context of political speech, the Supreme Court espoused the following view in 1964:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected….Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.[91]

Thus, a prohibition against the communication of false information, spread with the intent to deceive, should not fail a First Amendment challenge.

Additionally, concern for the potential chilling effect of a proposal lacking the intent requirement counsels this result as well. Campaigns have an incentive to turn out their supporters – and do so through extensive 'Get Out the Vote' mobilization efforts in the days and weeks leading up to an election. If Congress were to criminalize deceptive communications without qualification, these well-meaning entities may be disincentivized from participating in voter turnout efforts generally. Depending on the severity of the

[89] *Id.*
[90] *See* Hustler Magazine v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas."); Brown v. Hartlage, 456 U.S. 45, 60 (1982) ("demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements").
[91] Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

regulation, volunteers may even be turned off from this form of civic participation. Requiring a showing of the sender's intent to mislead or defraud protects well-intended parties from suffering a criminal penalty for behavior that should be promoted – i.e., for actions that contribute meaningfully to the democratic process.

V. CONCLUSION

Misinformation efforts have risen in prominence with the advent of social media platforms. Prosecuting deceptive communications as to election information, voting qualifications, and candidate endorsements is a worthwhile endeavor –one federal prosecutors are currently ill-equipped to pursue with the force deserved. Other methods of curbing deceptive practices fail on a number of levels. Reliance on self-regulation by online platforms that are currently exploited for these malicious ends would be insufficient, even if backed up by an official mandate. Requiring social media platforms to take down violating posts may lessen the reach of deceptive online messages but it would not disincentivize the deceptive acts themselves. Nor would it address acts of deception offline. Only a penalty of the sort envisioned by a criminal prohibition can accomplish that. A number of factors urge immediate action on the criminalization of deceptive election communications.

In 2018, Florida voters approved Amendment 4, an amendment to the state constitution automatically restoring the right to vote to Floridians with felony records.[92] The Amendment excludes those with prior convictions for murder or felony sex offenses. Even with these exceptions, Amendment 4 affects approximately 1.4 million individuals with past felony convictions. But, as with most other state felon re-enfranchisement policies, these voters will have to re-register in order to be able to vote in upcoming elections. Because the law may be confusing to voters – who may not understand, for example, that they are required to register, or who may erroneously believe the exceptions to enfranchisement apply to them – this period of registration provides a ripe opportunity for ill-intended parties to use misinformation to further confuse or disenfranchise voters. Florida, with its status as a contentious battleground state and fourth largest number of Electoral College votes in the country, represents a particularly susceptible target for misinformation campaigns of this sort. A prohibition on deceptive communications could protect the sanctity of those 1.4 million voters, and the wishes of Florida's voters to re-enfranchise them – but only if enacted in time.

Moreover, recent concerns of election interference by foreign entities raise the specter this threat of interference could pose to our elections in absence of a law explicitly criminalizing deceptive practices. Russia's now well-known efforts to interfere in the 2016 presidential election have presented an example of the methods foreign countries can implement to interfere with our elections via the internet. A prohibition on deceptive election communications could potentially dampen the ability of foreign entities to spread misinformation online that could sway future elections, although exterritoriality concerns may come into play. These interests command swift action by Congress to protect the sanctity of our elections and the rights of voters, long held fundamental to our democratic way of life.

[92] *Voting Rights Restoration Efforts in Florida*, BRENNAN CENTER FOR JUSTICE (Apr. 11, 2019), https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida.

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